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No. 88-798

In the Supreme Court of the United States

OCTOBER TERM, 1988

DONALD P. HODEL, SECRETARY OF THE INTERIOR,
PETITIONER

v.

THE MUSCOGEE (CREEK) NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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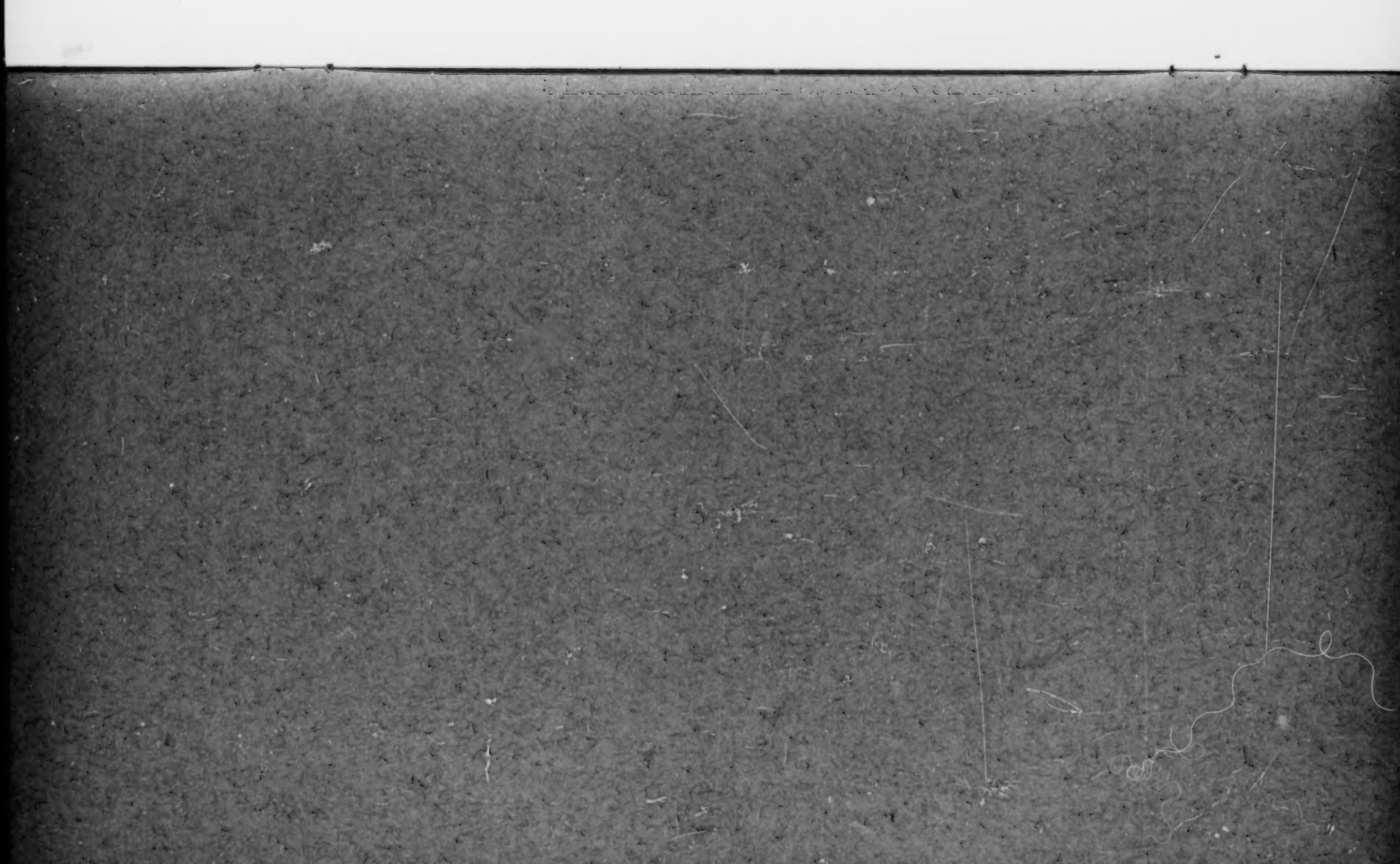

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Respondent makes no attempt to answer our argument (Pet. 5-7, 18-24) that the authority of the Muscogee (Creek) Nation to maintain tribal courts having general jurisdiction over tribal members was terminated by Section 28 of the Curtis Act of June 28, 1898 (ch. 517, § 28, 30 Stat. 504-505) and the Creek Allotment Act of March 1, 1901 (ch. 676, § 47, 31 Stat. 873) and was not revived by Section 3 of the Oklahoma Indian Welfare Act of 1936 (OIWA), 25 U.S.C. 503. Respondent mentions the merits only in a footnote (Br. in Opp. 7 n.7), in which it merely adopts the reasoning of the court of appeals that we have shown to be erroneous.

Although the court below clearly erred in directing the Secretary to recognize tribal courts that Congress long ago abolished, we do not urge the Court to grant plenary review at this time. Instead, we suggest (Pet. 26-28) that the Court hold the petition in this case pending the filing and disposition of a petition for a writ seeking review of

the decision of the Oklahoma Court of Criminal Appeals in *State* v. *Brooks,* No. S-85-117 (Oct. 14, 1988), which concerns the jurisdiction of the State of Oklahoma over the activities of Indians on restricted Creek allotments. The issues in this case and *Brooks* share a common legal and historical background, and they are closely related as a practical matter, because the need for tribal jurisdiction would be greatly diminished if the State has general jurisdiction over tribal members on allotted lands. *Brooks* has other important implications for the United States as well, because if the State is found to be without general civil and criminal jurisdiction on restricted allotments, the United States would have to assume primary responsibility for law enforcement on 413,000 acres of individual restricted lands and 60,000 of tribal lands of the Five Civilized Tribes that are scattered throughout eastern Oklahoma. Respondent nevertheless argues that the petition in this case should be denied outright, without regard to the imminent filing of a petition in *Brooks.* However, each of the reasons it advances for that course is insubstantial.

1. Respondent argues (Br. in Opp. 11) that it is a matter of speculation whether the State will actually file a certiorari petition in *Brooks.* Respondent is mistaken. On December 5, 1988, Justice White extended the time, to and including January 12, 1989, within which to file a certiorari petition in *Brooks* (*State of Oklahoma* v. *Brooks,* No. A-443), and we have been informed by the Office of the District Attorney for Tulsa County that the State will file a petition by that date. The Court therefore will have the opportunity to pass on the questions of state jurisdiction presented by *Brooks* in the very near future.

2. Respondent contends (Br. in Opp. 3-5) that to postpone action on the petition in this case pending the disposition of *Brooks* would unjustifiably prolong the sort

of bureaucratic obstruction of respondent's tribal government that was found in *Harjo* v. *Kleppe,* 420 F. Supp. 1110 (D.D.C. 1976), aff'd, 581 F.2d 949 (D.C. Cir. 1978). As the court below recognized (Pet. App. 8a-9a), however, *Harjo* concerned the federal government's policies toward the legislative and executive branches of the Creek Nation's government, which were "expressly preserved" by Congress. 420 F. Supp. at 1130. This case, by contrast, concerns the Secretary of the Interior's wholly lawful decision to refuse to furnish federal funds to support the judicial branch of the Creek Nation's government, which was expressly *abolished* by the Curtis Act and the Creek Allotment Act. This case therefore involves no improper "obstruction" of lawful governmental functions of the Muscogee Nation. In fact, respondent states (Br. in Opp. 4) that it has maintained tribal courts since 1982 without federal funding and without Secretarial approval of the general jurisdiction of those courts.[1] The course we propose therefore will not prevent respondent from maintaining its tribal courts pending a definitive determination of their legality.

3. In respondent's view (Br. in Opp. 8-9), the question of state jurisdiction over members of the Five Civilized Tribes on restricted allotments, at issue in *Brooks,* has no bearing on the establishment of tribal courts having the same jurisdiction. Respondent is wrong for two reasons. First, the court below expressed concern that under the original decision of the Oklahoma Court of Criminal Appeals in *Brooks* (which has since been withdrawn), the

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[1] Respondent notes (Br. in Opp. 3-4) that the Secretary approved its constitution, but respondent fails to acknowledge that the Secretary's approval expressly did not authorize any action under the constitution that would be contrary to federal law, as the establishment of tribal courts having general civil and criminal jurisdiction over tribal members would be. See Pet. 10; Pet. App. 26a.

State of Oklahoma did not have jurisdiction over the actions of Indians on restricted Creek allotments, and that there would be a "jurisdictional 'no man's land' " if tribal courts likewise did not have such jurisdiction (Pet. App. 14a-15a). Although the court below stated that this consideration was not "critical" to its decision sustaining respondent's tribal courts (*id.* at 14a), the court obviously found that factor to be relevant in construing Section 3 of the OIWA, and, at the very least, it demonstrates the interrelatedness of the questions of state jurisdiction in *Brooks* and tribal jurisdiction in this case. Second, even if the provisions of the Curtis Act and Creek Allotment Act that abolished the Creek tribal courts were implicitly repealed by Section 3 of the OIWA, the recognition of state jurisdiction in *Brooks* would furnish a sufficient reason for the Secretary's decision to deny federal funding to maintain a tribal court system that duplicates state jurisdiction.

4. Respondent next argues (Br. in Opp. 9-10) that *Brooks* would not actually present an occasion for this Court to resolve questions of state jurisdiction over Creek allotments. Thus, respondent argues that *Brooks* involves only state taxing authority, not general civil and criminal jurisdiction, and that the Oklahoma Court of Criminal Appeals' holding that the State cannot tax the sale of cigarettes by Indians to Indian customers on a restricted allotment is consistent with *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *California State Board of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985). Those cases, however, held only that a State may not tax the sale of cigarettes to Indians on an Indian reservation; they did not hold that a State is barred from taxing sales on a restricted allotment where, as in most of eastern Oklahoma, there no longer is any Indian reservation. If

this Court grants review in *Brooks* and holds that Congress has authorized the State to apply even its tax statutes to sales made to Indians on restricted allotments, it would follow a fortiori that the State may subject Indians on restricted allotments to the general civil and criminal jurisdiction of its courts.

5. Finally, respondent suggests (Br. in Opp. 8 n.8) that the jurisdictional issues do not warrant review because the United States is currently exercising jurisdiction over major crimes in eastern Oklahoma in any event. Respondent relies on *United States* v. *Sands,* No. 88-21-Cr. (E.D. Okla. Sept. 13, 1988), in which a Muscogee Indian was convicted of the murder of another Muscogee Indian on a restricted allotment. See Br. in Opp. App. 1a-2a. Respondent fails to point out, however, that the United States brought those charges only after the state court had dismissed charges against the defendant for lack of jurisdiction (*State* v. *Sands,* CRS 87-149 (Dist. Ct. Okfuskee County, Okla., Feb. 23, 1988)), in order to assure that the defendant would not go unpunished.[2] Thus, the *Sands* case vividly demonstrates the need for a definitive resolution of the various jurisdictional issues affecting Indian lands in eastern Oklahoma.

For the foregoing reasons and those stated in the petition for a writ of certiorari, it is respectfully submitted that the petition should be held and disposed of as appropriate in light of the disposition of the petition to be filed by January 12, 1989, in *Brooks,* and in light of any further developments by that time in *State* v. *Klindt,* No.

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[2] We have been informed by the Office of the United States Attorney that it brought the jurisdictional issue to the attention of the district court.

S-84-781 (Okla. Crim. App. Nov. 7, 1986), rehearing granted (July 26, 1988).[3]

CHARLES FRIED
Solicitor General

DECEMBER 1988

[3] As we have explained (Pet. 14-15, 26, 28), the question of state jurisdiction over restricted allotments also is involved in *Klindt*, which, as of the date of the filing of this reply brief, was still pending on rehearing before the Oklahoma Court of Criminal Appeals. Although respondent is correct (Br. in Opp. 10) that the original decision in *Klindt* was remanded for a determination whether the defendant is an Indian, the court withdrew that decision on July 26, 1988. Pet. 15. It therefore is possible that the court will first address the jurisdictional issues in *Klindt* by assuming, arguendo, that the defendant is an Indian, and then remand (if appropriate) for resolution of the latter issue.

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